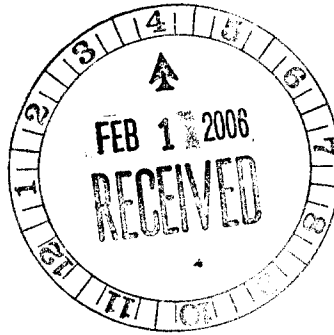


February 1, 2006



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BY HAND-DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423-0001


Re: Finance Docket No. 34818
City of Jersey City et al.
Petition for Declaratory Order

215713

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are an original and ten copies of "Consolidated Rail Corporation's Reply to the Petition for Declaratory Order of Jersey City, et al." Please date-stamp the enclosed extra copy and return it to our representative.

Sincerely yours,



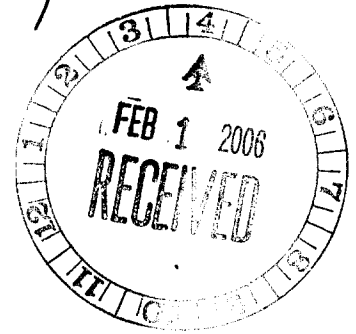
Robert M. Jenkins III

RMJ/bs

Enclosures

215713

BEFORE THE
SURFACE TRANSPORTATION BOARD



STB Finance Docket No. 34818

CITY OF JERSEY CITY, RAILS TO TRAILS CONSERVANCY,
PENNSYLVANIA RAILROAD HARSIMUS STEM EMBANKMENT
PRESERVATION COALITION, AND NEW JERSEY STATE ASSEMBLYMAN
LOUIS M. MANZO—PETITION FOR DECLARATORY ORDER

CONSOLIDATED RAIL CORPORATION'S REPLY TO THE
PETITION FOR DECLARATORY ORDER OF JERSEY CITY, ET AL.

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Dated: February 1, 2006

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 34818

**CITY OF JERSEY CITY, RAILS TO TRAILS CONSERVANCY,
PENNSYLVANIA RAILROAD HARSIMUS STEM EMBANKMENT
PRESERVATION COALITION, AND NEW JERSEY STATE ASSEMBLYMAN
LOUIS M. MANZO—PETITION FOR DECLARATORY ORDER**

**CONSOLIDATED RAIL CORPORATION'S REPLY TO THE
PETITION FOR DECLARATORY ORDER OF JERSEY CITY, ET AL.**

Consolidated Rail Corporation ("Conrail") replies herein to the "Petition for a Declaratory Order" filed January 12, 2006, by City of Jersey City, Rails to Trails Conservancy, the Pennsylvania Railroad Harsimus Stem Embankment Coalition, and State Assemblyman Louis M. Manzo (collectively, "City et al." or "petitioners"). Petitioners ask the Board to initiate a declaratory order proceeding to determine whether what remains of the so-called "Harsimus Branch" property in Jersey City is a line of railroad that may not be abandoned without prior Board approval under 49 U.S.C. § 10903.

Conrail does not oppose City et al.'s request that the Board initiate a declaratory order proceeding. If the Board begins a proceeding, however, it should provide a reasonable schedule for the submission of evidence and argument by Conrail and the owners of the property at issue.¹ Although petitioners have requested "expedited consideration" in this proceeding, there is no

¹ The property is owned by eight companies—212 Marin Boulevard, L.L.C., 247 Manila Avenue, L.L.C., 280 Erie Street, L.L.C., 317 Jersey Avenue, L.L.C., 354 Coles Street, L.L.C., 389 Monmouth Street, L.L.C., 415 Brunswick Street, L.L.C., and 446 Newark Avenue, L.L.C.—which are collectively referred to herein as "SLH Properties." By decision served January 24, 2006, the Board granted SLH Properties' petition to intervene in this proceeding.

emergency here justifying a departure from the normal modified procedure requirements of 49 C.F.R. Part 1112. Conrail has confirmed with SLH Properties, and is authorized to state here, that SLH Properties will not remove any of the existing “piers” or “embankments” on the property during the pendency of a declaratory order proceeding. Moreover, as the Board well knows, the determination whether a particular piece of railroad property is spur or yard property, as opposed to a regulated line of railroad, is a highly fact-specific inquiry in any case. In this case, where the property at issue was transferred to Conrail pursuant to the United States Railway Association’s Final System Plan,² there are additional factual and legal considerations that must be applied. Finally, since Conrail has already disposed of most of the “Harsimus Branch” property over the past 20 years for redevelopment—with the City’s strong encouragement—petitioners’ belated assertion that the Board should intercede in the disposition of the last remaining pieces of property deserves particularly careful scrutiny on a complete record.

Contrary to the suggestion in City et al.’s petition, this case is not one in which a railroad downgraded a line of railroad and then argued that it was spur or yard track in order to avoid the ICC’s or STB’s abandonment authority. When Conrail was formed from the remains of a number of bankrupt northeastern railroads, it was an entirely new entity, operating a new rail system. Whatever use the Pennsylvania Railroad may have made of the “Harsimus Branch” property in the distant past, when the property came into Conrail’s possession in 1976, it was no line of railroad, and Conrail never had any plans to operate it as such. At best, it was yard or spur track that served only a switching function for a few shippers, turnaround space for trains operating on other lines, and storage space for cars.

² See Regional Rail Reorganization Act of 1973, P.L. 93-236, 87 Stat. 985 (1974).

Conrail's evidence will also show that when Conrail in the 1980's stopped using the track even to switch the last few shippers in the Harsimus Cove area, no one—least of all Jersey City—claimed that Conrail must seek discontinuance or abandonment authority from the Interstate Commerce Commission. On the contrary, Jersey City and the Jersey City Redevelopment Agency strongly encouraged Conrail to make the "Harsimus Branch" property, particularly along the waterfront, available for development, and Conrail began to sell off various parcels to the Redevelopment Agency and to private developers. Over time, almost 90% of the acreage was sold off in a half dozen different transactions. The majority of the "Harsimus Branch" property is now covered by commercial and residential developments.

The remainder of the property consisted of the "embankments" described in City et al.'s petition, which were connected by bridges across the streets below, and a short section of elevated track supported by stone or concrete piers. Conrail's evidence will show that in the early 1990's, after Jersey City complained that those bridges and elevated tracks were a dangerous eyesore, Conrail tore them down, and removed all of the tracks on the embankments. Here again, at no point did the City or anyone else claim Conrail needed to seek abandonment authority to do so. Conrail had always treated the property as unregulated "spur, industrial, team, switching, or side tracks" within the meaning of 49 U.S.C. § 10906. With the removal of the tracks and bridges, and in the absence of any freight shippers, the property ceased being "transportation" property at all for purposes of the ICC Termination Act. See 49 U.S.C. §§ 10102(9) and 10501(b).

Not only did Conrail remove all of the railroad infrastructure on the remaining property at Jersey City's request, but Conrail also in the mid-to-late 1990's negotiated to sell the property to the City. Conrail's evidence will show that the City and the Jersey City Redevelopment Agency

spent considerable time looking at the property, but never consummated a purchase. Eventually, in the early 2000's, Conrail decided to put the remaining property up for bid, and included the Jersey City Redevelopment Agency among those invited to bid. The City was fully aware of and encouraged Conrail's dealings with the Redevelopment Agency. Conrail received no bid from the Redevelopment Agency or any other governmental authority. In fact, the only entity to fully meet Conrail's minimum bid requirements was a private developer, the predecessor to SLH Properties, which closed the sale in July 2005.

Conrail's evidence will show that at all times Conrail cooperated with inquiries from Jersey City and other government entities concerning acquisition of the property, whether by negotiated purchase or by the exercise of eminent domain. In particular, the allegation in City et al.'s pleading that Conrail representatives told City representatives in 2004 that the use of eminent domain was preempted by federal law is false. Conrail's position was and is that the property ceased being transportation property years ago; accordingly, New Jersey state and local law govern the disposition of the property. There is no federal preemption.

Contrary to the suggestion in City et al.'s petition, Conrail's evidence will show that this is not a case like *Chelsea Property Owner's—Abandonment—Portion of the Consolidated Rail Corporation's West 30th Street Secondary Track in NY, NY*, 8 I.C.C.2d 773 (1992), where the Conrail consistently treated the property and track structure as a regulated railroad line and where Conrail believed that it could economically provide through rail service in the future. When Conrail obtained the "Harsimus Branch" property in 1976, "lighterage" over the water to and from Manhattan was a distant memory. From Conrail's standpoint, as in *Nicholson v. ICC*, 711 F.2d 364, 367 (D.C. Cir. 1983), the "Harsimus Branch" was a "mass of 'tracks' (as distinguished from lines) naturally and necessarily designed and used for loading, unloading,

switching and other purposes.” That was all it could possibly be used for, and all it was used for until the tracks were torn up, with the City’s urging and support, and chunks of the property sold off for redevelopment.


There is little doubt about the motive for City et al.’s belated effort to assert that the Harsimus Branch property is a line of railroad. It is not to preserve rail service. There are no shippers and no infrastructure capable of providing service.³ The City’s purpose is not trail use, because there is no trail, and the City is fully aware that Conrail would not agree to such use in any event. It is not historic preservation, because the “embankments” have already been subjected to state and local historic preservation requirements, which are more than adequate to provide any protection that could be justified. What City et al.’s belated claim is about is throwing a cloud on Conrail’s sale of the last pieces of property in this area, so as to obtain leverage in a condemnation action.

The Board should not permit its processes to be used to interfere with the proper disposition of this property under New Jersey state and local law, nor should it act without a full factual record and briefing addressed to the unique facts presented here. SLH has committed that it will not demolish or remove any piers or other structures on the property during the pendency of a declaratory order proceeding. Accordingly, Conrail proposes that the Board order a modified procedure schedule under which City et al.’s opening filing would be due within 30 days from the date of the Board’s order, Conrail’s and SLH Properties’ reply filings would be

³ Jersey City’s own ordinances attached as Exhibit G to City et al.’s petition recite that the “Harsimus Branch” property “is no longer needed for any railroad purpose or use.” (City Ordinance Nos. 04-096 and 05-064).

due within 45 days thereafter, and petitioners' rebuttal filing would be due within 15 days thereafter.

Respectfully submitted,



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February 1, 2006

CERTIFICATE OF SERVICE

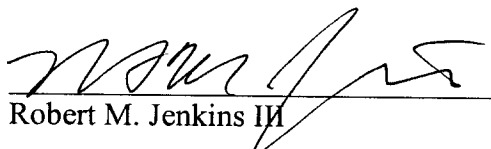
I hereby certify that on February 1, 2006, I caused a copy of the foregoing Reply to be served by hand-delivery or overnight courier on:

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